

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MENDY JOHNSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,046,617 &
<b>STATE OF KANSAS</b>	)	1,048,295
	)	
Respondent	)	
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the September 21, 2011 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 25, 2012.

**APPEARANCES**

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award, with the exception that the preliminary hearing transcript listed as February 22, 2010, in the Award appears to be misdated. The preliminary hearing transcript on file with the Division, is dated February 9, 2010.

**ISSUES**

The ALJ found claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. The ALJ adopted the assessment of Dr. Bieri that claimant has a 15 percent whole body functional impairment to the neck and as of October 12, 2010, a 61.50 percent permanent partial general (work) disability in Docket # 1,046,617 with a date of accident on May 19, 2009. Claimant claimed a separate accident

on September 1, 2009, which was assigned Docket # 1,048,295. Claimant was denied any temporary or permanent benefits in that claim.

Respondent argues that claimant failed to meet her burden of proof that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. Therefore, the ALJ's Award should be reversed and claimant denied compensation. Respondent also argues that if claimant is entitled to an award in Docket # 1,046,617, she should be limited to the medical treatment and temporary benefits only as she has failed to prove that she suffered any permanent injury from the incident on May 19, 2009. Respondent also argues that the ALJ improperly calculated claimant's average weekly wage by including fringe benefits for health insurance paid by the employer, when respondent was not making any contributions for health insurance premiums at the time of the accident.

Claimant argues that the Award should be affirmed.

**THE ISSUES ARE:**

1. Whether claimant met with personal injury by accident arising out of and in the course of employment;
2. Nature and extent of disability; the parties stipulated at oral argument to the Board that the task loss percentage and wage loss percentage determined by the ALJ in the Award is appropriate if a permanent partial disability award is determined to be proper. Therefore, the only issue under the heading of nature and extent would be claimant's whole person functional impairment, if any.
3. Average weekly wage.

**FINDINGS OF FACT**

Claimant worked for respondent (State of Kansas - KNI) for approximately 12 years. Claimant's job was as a disability technician working with individuals with behaviors.<sup>1</sup> In addition to her job with respondent which started in 1999, claimant began working for Shawnee Building Maintenance in 2004.

On May 19, 2009, claimant was out shopping with a resident when the two were involved in an automobile accident, in which claimant rear-ended another vehicle. Claimant testified that traffic had pulled over to allow an ambulance on a 911 call to go by. When the traffic resumed, the truck in front of her suddenly stopped. Claimant hit the accelerator to move forward and rear-ended the truck. This was part of a chain reaction involving the

---

<sup>1</sup> Refers to residents who may have outbursts at times and need to be deterred before they become violent.

vehicles ahead of them when someone apparently stopped to let someone else in line. Claimant testified that the air bag in the State vehicle she was driving did not deploy.

Claimant testified that she injured her neck in the accident and had a small cut on her head. She was shook up and had a headache, but declined the ambulance ride to the hospital. Claimant instead took the resident in the damaged vehicle back to KNI. When claimant started to experience neck pain, she talked to Diane Wagner in personnel health and was given approval to go to St. Francis to see Dr. Mead, the workers compensation physician. She was given Naproxen and anti-inflammatory medication and scheduled for six physical therapy sessions.

Claimant was later referred to Zhengyu Hu, M.D. for several visits. Dr. Hu ordered an MRI to determine the cause of the severe headaches claimant had developed. Dr. Hu gave claimant a series of steroid epidural injections in her neck. When these injections provided no relief, claimant was given shock treatments (electrotherapy<sup>2</sup>) and then trigger point injections.

Claimant testified that the injections didn't seem to help her and that Dr. Hu seemed irritated and frustrated about that.<sup>3</sup> Claimant testified that she was not given a lot of input in her treatment and had to utilize the Internet (Google) to find out what was being done to her. Dr. Hu performed facet joint steroid injections at C4, C5-6 and C6-7 for what was determined to be right mid to lower cervical facet joint dysfunction.<sup>4</sup>

Dr. Hu released claimant from treatment on October 13, 2009, finding her at maximum medical improvement. He allowed claimant to return to regular duty despite the fact that she continued to experience excruciating pain. Claimant testified that she felt she had nowhere to turn and that Dr. Hu told her that this is how workers compensation works and that his treatment was over.

Claimant testified that she was diagnosed with whiplash as a result of the accident, with pain in her neck radiating down into her back, right shoulder, right arm and into her hands to her fingertips. Claimant began to have a throbbing sensation in her right elbow on October 15, 2009.

Claimant was referred by her attorney to Dr. Curtis on July 18, 2009. The medical records from Dr. Curtis' treatment are not in this record. However, Dr. Bieri testified regarding their contents and the treatment provided claimant. According to Dr. Bieri, Dr.

---

<sup>2</sup> See Dr. Amundson's report.

<sup>3</sup> P.H. Trans. (Oct. 22, 2009) at 10.

<sup>4</sup> Bieri Depo. at 27-28.

Curtis found a loss of sensation in the C4-5 dermatomes, both right and left. He also found increased sensitivity in the C6 dermatome in the right arm. Additionally, deep palpation at C3-4, C4-5 and C5-6 caused pain to radiate into both of claimant's hands.<sup>5</sup> Apparently, Dr. Curtis made no findings at the C6-7 level. In a preliminary hearing Order dated October 23, 2009, Dr. Curtis was authorized by the ALJ to provide pain management for claimant until further order.

Claimant testified that it is hard for her to do household chores or to even fold laundry with her shoulder and elbow. She also testified that, since the accident, she cannot do as many physical activities with her son as she would like.

Claimant was referred by the ALJ for an independent medical examination with orthopedic surgeon Dr. Glenn Amundson, by Order of October 23, 2009. When claimant met with Dr. Amundson on December 11, 2009 for the IME, she had complaints of pain in her neck and right arm and headaches. Dr. Amundson examined the claimant and diagnosed degenerative neck changes, with probable exacerbation from the motor vehicle accident. Claimant stood 5 foot 9 inches and weighed 350 pounds, which Dr. Amundson described as being morbidly obese. An MRI displayed degenerative bulging discs at C5-6 and C6-7. Dr. Amundson also discussed joint hypertrophy on the right side at C4-5, C5-6 and C6-7.<sup>6</sup>

Dr. Amundson performed neck surgery on claimant on March 16, 2010, involving an anterior cervical fusion from C6 through C7. Claimant testified that the surgery was not successful as her symptoms got worse. She attempted to return to work on August 16, 2010, but was unable to make it on more than a hit or miss basis, never working 40 hours a week.<sup>7</sup> This was in part because claimant was moved to the total care unit where she was asked to lift, roll, and move residents who have no ability to bear weight. This was difficult with a 48 pound lifting restriction. Claimant was terminated on October 11, 2010, due to her inability to perform the job duties.<sup>8</sup> She has not worked anywhere since.

Dr. Amundson opined that there was every indication that claimant's current cervical condition is a direct result of the May 19, 2009 motor vehicle accident. In his report of December 11, 2009, Dr. Amundson opined that there was no indication in claimant's medical records that she had a significant preexisting condition.

---

<sup>5</sup> *Id.* at 31.

<sup>6</sup> P.H. Trans. (Feb. 9, 2010), Cl. Ex. 3 (Dr. Amundson's Dec. 11, 2009 IME report).

<sup>7</sup> R.H. Trans. at 13-14.

<sup>8</sup> *Id.* at 14.

Claimant testified that she didn't have any problems with her neck before the automobile accident and had been able to perform her work and do activities with her son with no problems. Now, she has uncontrollable headaches, tightness in her shoulders and the back of her shoulder blades and tingling in her hands. She is unable to sit in a chair without arm support because it makes her neck hurt. Walking can be a problem when she swings her arms because that causes her fingers to tingle, like electricity going down her arms into her fingers.<sup>9</sup>

Before working for respondent, claimant worked for a Headstart Preschool Learning Center. As part of her employment, claimant obtained a commercial drivers license (CDL) to operate a school bus in case a substitute driver was needed. Claimant doesn't feel that she could physically operate a bus now. Claimant testified that she thought she might be able to perform computer work, but without proper arm support that would not be an option. She would also need training on how to operate a computer. Claimant testified that there was nothing she could do that would not make her miserable.<sup>10</sup>

Claimant claimed another accident on September 1, 2009, testifying that she was back to work on full duty when she was trying to help a resident into a wheelchair after lunch. The resident became aggressive, grabbed her by the back of the hair and pulled her, trying to hit her in the face. She was able to pull away and the resident's swing missed her face and hit her purse. This action created additional pain in claimant's already injured neck and shoulders. The additional pain was bad enough to require that she take the next work day off. After a few days, claimant's pain returned to the same level as after the May 19, 2009 accident.

Claimant reported this incident to personnel health and filled out an incident report and it was reported to Dr. Mead. Claimant did not receive any additional treatment for the September 1, 2009 injury because she was still receiving treatment for the injuries from the May 19, 2009 accident. But she was sent for x-rays and an MRI.

Claimant was referred by the ALJ, in an order of November 18, 2010, to board certified independent medical examiner Peter V. Bieri, M.D. Claimant met with Dr. Bieri on January 17, 2011 for the IME. Claimant reported persistent neck pain and headaches. Claimant also reported difficulty lifting, grasping and reaching with her right hand due to intermittent numbness and tingling associated with the pain radiating down from her neck. An MRI from July 14, 2009, revealed bulging discs at C5-6 and C6-7.

---

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 17.

Dr. Bieri opined that claimant suffered a disc injury at two levels of the cervicothoracic spine on or about May 19, 2009.<sup>11</sup> When Dr. Bieri met with claimant she had already undergone surgical intervention. He testified that surgery doesn't always mean a relief of pain, and that the idea behind fusion surgery is to stabilize the area. He went on to assign a 15 percent whole person impairment, based on the DRE Cervicothoracic Category III of the Fourth Edition of the AMA *Guides*<sup>12</sup> and utilizing the range of motion model.<sup>13</sup> He found no additional impairment for the September 2009 incident. He imposed permanent work restrictions of no lifting of more than 40 pounds, frequent lifting of up to 20 pounds, and constant lifting of up to 10 pounds.<sup>14</sup> Dr. Bieri reviewed the task list prepared by vocational expert Richard W. Santner and opined that claimant could no longer perform 11 out of the 47 tasks on the list for a task loss of 23 percent.<sup>15</sup>

Claimant met with Richard W. Santner for a vocational assessment on January 25, 2011 and February 17, 2011. Mr. Santner identified 12 different employers for claimant in the 15 years leading up to her injuries and identified 47 different tasks. Claimant was not working at the time of this meeting and as far as Mr. Santner knew, claimant had not worked since October 12, 2010. Therefore, he found claimant had a 100 percent wage loss.

Claimant indicated in her interview that since the accident she had gained 60 pounds, leaving her at 260 pounds. She attributes this to her inability to be physically active. However, as noted above, claimant weighed 350 pounds on December 11, 2009, when examined by Dr. Amundson. Claimant also reported less range of motion of her head especially from side to side, tilting or looking down.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>16</sup>

---

<sup>11</sup> Bieri Depo., Ex. 2 at 5 (Dr. Bieri's Jan. 17, 2011 report).

<sup>12</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

<sup>13</sup> Bieri Depo., Ex. 2 at 6 (Dr. Bieri's Jan. 17, 2011 report).

<sup>14</sup> *Id.*, Ex. 2 at 7 (Dr. Bieri's Jan. 17, 2011 report).

<sup>15</sup> *Id.*, Ex. 3.

<sup>16</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>17</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>18</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>19</sup>

Respondent contends that the limited severity of the May 19, 2009, automobile accident belies claimant's contentions that she suffered significant injury at that time. However, the testimony of claimant, along with the opinion of Dr. Bieri, the court ordered medical examiner, couples claimant's ongoing neck complaints with the accident. Respondent provides no contradictory medical opinion on the issue of causation. The Board finds that claimant suffered personal injury by accident on May 19, 2009, which arose out of and in the course of her employment with respondent.

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.<sup>20</sup>

---

<sup>17</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>18</sup> K.S.A. 44-501(a).

<sup>19</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>20</sup> K.S.A. 44-508(e).

Respondent contends that Dr. Bieri was unable to identify a lesion or change in the physical structure of claimant's body as required by the statute. However, when asked to identify the actual injury to claimant's neck as the result of the May 19, 2009 accident, Dr. Bieri identified the documented disc injury at two levels, C5-C7, along with clinical radiculopathy.<sup>21</sup> Respondent's argument on this issue fails.

With regard to the second alleged accident on September 1, 2009, claimant's testimony is uncontradicted. The Board finds that the incident with the resident when claimant's hair was pulled is supported by this record. However, there is no evidence to support any finding of a permanent worsening of claimant's condition from that accident. Additionally, there was no medical treatment provided for that incident. Therefore, claimant is entitled to no compensation, either temporary or permanent from that accident.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>22</sup>

As noted in the Award, Dr. Bieri is the only health care professional to provide a functional impairment rating for claimant in this matter. The 15 percent whole person rating provided by Dr. Bieri and awarded by the ALJ in Docket # 1,046,617 is affirmed.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.<sup>23</sup>

The parties stipulated at oral argument to the Board that both the task loss and wage loss findings of the ALJ are appropriate and should be affirmed by the Board should this matter be found to be compensable. Therefore, the Board finds that claimant has suffered a 100 percent wage loss and a 23 percent task loss as the result of the accident on May 19, 2009. This results in a work disability of 61.50 percent effective October 12, 2010. The Board affirms those findings from the Award.

---

<sup>21</sup> Bieri Depo. at 10.

<sup>22</sup> K.S.A. 44-510e(a).

<sup>23</sup> K.S.A. 44-510e.

K.S.A. 44-511(a)(2) states:

(a) As used in this section: (1) The term “money” shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source. (2) The term “additional compensation” shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee’s employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

The parties stipulated to a base wage of \$506.40. Additionally, the ALJ found a weekly value of the employers contribution to claimant’s pension to be \$35.83, and a weekly bonus value of \$9.61. The only ongoing dispute with regard to claimant’s average weekly wage stems from the health insurance being provided to claimant by respondent. For reasons not explained in this record, respondent’s Ex. A to the regular hearing fails to show respondent’s health insurance contributions for claimant for the period through all of March, April and May, 2009. Respondent argues that claimant has failed to prove any health insurance contribution by respondent during that period of time. However, claimant testified at the regular hearing that she has had health insurance with respondent as a benefit from almost the time she was hired 12 years before. Claimant testified that she was positive that, on May 19, 2009, she had health insurance through respondent for both herself and her seven-year-old son. The ALJ found, and the Board agrees, that claimant had health insurance which was being provided by respondent in March, April and May, 2009, for both herself and her son. The weekly benefit of \$78.97 is added to claimant’s average weekly

wage, and pursuant to K.S.A. 44-511(a)(2), effective October 12, 2010, claimant's average weekly wage is \$630.81. Therefore, the Award of the ALJ is affirmed on all issues.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the September 21, 2011, Award of the ALJ should be, and is, hereby affirmed. Claimant has proven that she suffered personal injury by accident which arose out of and in the course of her employment with respondent on May 19, 2009. She is entitled to a 15 percent permanent partial whole person functional impairment, followed by a 61.50 percent whole person permanent partial general disability award, effective October 12, 2010, all based upon an average weekly wage of \$506.40 through October 11, 2010, and an average weekly wage of \$630.81, effective October 12, 2010.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 21, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2012.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge